IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 8, 2006 Session

STATE OF TENNESSEE, DHS, ET AL. v. CHRISTAL J. RHEA

Appeal from the Juvenile Court for Anderson County
No. J-21829 Patricia R. Hess, Judge

No. E2005-00330-COA-R3-JV - FILED MARCH 27, 2006

The State of Tennessee, DHS, filed a petition for civil contempt against Christal J. Rhea ("Mother") due to her failure to pay support for her minor child in state custody, Ashley J. Seeber (DOB: December 10, 1997). Mother responded by filing a petition to modify her support obligation. Following a hearing, the trial court held Mother in contempt and sentenced her to 40 days in jail; however, the court specified that she could purge herself of contempt by paying support of $1,100. The trial court then indicated that it was modifying Mother's support award, but it failed to set a specific amount of support. Mother appeals. We affirm in part and vacate in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part; Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Billy P. Sams, Oak Ridge, Tennessee, for the appellant, Christal J. Rhea.

Paul G. Summers, Attorney General and Reporter, and Warren Jasper, Assistant Attorney General, for the appellee, State of Tennessee, Department of Human Services, and assignee of Ashley Seeber.

OPINION

I.

By order entered January 20, 2004, the trial court directed Mother, whose minor child was then in state custody, to pay child support of $162 for the month of January, 2004, and $275 per month beginning in February, 2004. This latter amount represents a monthly child support obligation of $245 and a payment of $30 to be applied toward Mother's child support arrearage. Nine months later, the State filed a petition for civil contempt, asserting that Mother "ha[d] failed and refused to pay [child support] as ordered and is in arrears $1,766.60 as of " September 30, 2004. On November 16, 2004, Mother filed a petition to modify her child support obligation, claiming that

she had been laid off from work and had been denied unemployment benefits. She claimed that a modification of support was appropriate because of the significant variance between the support ordered and the current guideline amount.

The trial court conducted a hearing on February 1, 2005; Mother was the only witness. Mother stated that she began working for Eagle Construction & Environmental Services in January, 2004, when she was approximately one month pregnant, but explained that she did not receive her first paycheck until April when Eagle "won their contract." When Mother began receiving paychecks, child support was automatically withheld. However, while Mother made a small child support payment in March, 2004, she paid nothing in January or February of 2004. When questioned as to why she failed to make the January and February support payments when she finally received her first paycheck, she responded that it was

> because I hadn't worked for three months and I was pregnant, and I had to support and live and get everything else situated, and it was already being paid, I thought. I thought my backpay was added on every month.

Mother admitted that she borrowed money to pay her bills prior to receiving her April paycheck, but when asked why she didn't borrow money to pay her child support, she simply stated

> because I had no (inaudible) to pay for those months that I do now, because I'm going to find a job now. I'm not pregnant and I can do this.

Mother was laid off in August, 2004, when she was eight months pregnant. Mother testified that, sometime after being laid off, she went to the child support office in an attempt to modify her support obligation. She was told that she would need to return with a copy of her "layoff slip." She failed to do so. She testified at trial that she had just recently received her layoff slip – some five months after losing her job.

Mother's new child was born in September, 2004. She testified that she had been at home with the baby ever since. She stated that she did not qualify for unemployment because she "didn't work the previous year." While she claimed she had looked for jobs at "every convenient [sic] store, every little shopping center that you can think of near Lovell Road," she did not have copies of her job applications. She stated that the applications were locked up in her sister's car and that she would not have access to them until later in the day. Mother never filed any of these applications as exhibits with the trial court. She stated that she would be able to get a job once her child turned six months old, because, at that time, the child would qualify for federally-funded daycare and Mother would be able to leave him every day.

At the conclusion of the hearing, the trial court announced its ruling from the bench, finding Mother in willful contempt of court for her failure to pay support in the months of January, February,

October, and December of 2004, and January, 2005. While Mother paid no child support in August or September, 2004, the court found no contempt for these months "because of the late stages of the pregnancy." In addition, Mother made a double payment on child support in November. While the court found Mother in contempt for failure to pay support for five months, the court decided to count only four months, presumably because of the double payment in the month of November. The court then sentenced Mother to 40 days in jail. As set forth earlier in this opinion, the court stated how she could purge herself of contempt.

With respect to the modification issue, the trial court engaged in a lengthy discussion with counsel for both parties in an effort to determine whether Mother was entitled to a modification. In its final order, filed February 2, 2005, the trial court found as follows:

> Child support is not modified in that there is not a 15% change. [The] Court orders support calculated using earning capacity of minimum wage rate and total lack of visitation and one child in the home.

From this order, Mother appeals.

II.

In this non-jury case, our review of the trial court's factual findings is *de novo*; however, the case comes to us accompanied by a presumption that those findings are correct – a presumption that we must honor unless the evidence preponderates against the trial court's factual findings. Tenn R. App. P. 13(d); ***Musselman v. Acuff***, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). Our search for the preponderance of the evidence is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566, 567 (Tenn. Ct. App. 1991).

III.

Mother raises two issues on appeal: (1) whether the trial court erred in finding her in contempt, and (2) whether the trial court erred in its ruling on modification of child support. We affirm the trial court's finding of contempt, but vacate and remand on the issue of modification.

"[A] civil contempt is one where a person refuses or fails to comply with an order of the court and punishment is meted out for the benefit of a party litigant. The punishment in a civil contempt is remedial compelling the doing of something by the contemnor, which, when done, will work his [or her] discharge." ***Shiflet v. State***, 400 S.W.2d 542, 543 (Tenn. 1966). The burden is on the contemnor to prove an inability to pay the support ordered. *See* ***Leonard v. Leonard***, 341 S.W.2d 740, 743 (Tenn. 1960).

In the instant case, it was Mother's burden to persuade the court that she was unable to pay the support as ordered. With respect to the months of January and February, 2004, Mother's explanation for why she failed to pay the court-ordered support once she received her paycheck was, essentially, that she had other priorities. As for the months after she was laid off, she claimed that she had applied for work at multiple locations, but she failed to mention any specific names of stores where she had applied and she did not introduce into evidence any of her job applications. The court was not persuaded by her testimony and ruled that her failure to find work amounted to civil contempt. Given the deference due the trial court's determinations on the issue of witness credibility, *see* ***Massengale***, 915 S.W.2d at 819; ***Bowman***, 836 S.W.2d at 566, 567, we cannot say that the evidence preponderates against the trial court's finding of contempt.

Mother suggests that the trial court committed error in alluding to Mother's ability to borrow money. While Mother's borrowing of money was mentioned by the trial court, we do not believe her failure to borrow money when she could was a factor in the court's decision. Rather, we believe the court acted as it did because it did not accredit Mother's testimony that she did not have the ability to pay support.

The issue of modification is more of a problem. Mother contends in her brief that her testimony at trial "was sufficient to establish zero income for a period of eight months, from August of 2004 until June of 2005." However, Mother did not file her petition to modify until November 16, 2004. The law is clear that Mother was not entitled to a modification of child support prior to the filing of her petition. Tenn. Code Ann. § 36-5-101(a)(5) (Supp. 2004)[1] ("Such [child support] judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed."); ***Rutledge v. Barrett***, 802 S.W.2d 604, 606 (Tenn. 1991) ("Retroactive modifications are plainly unauthorized.").

On the subject of a modification of *prospective* child support, Mother would only be entitled to a change in her support obligation predicated upon a change in income if she could prove "a significant variance . . . between the guidelines and the amount of support currently ordered." The guidelines define a significant variance as "at least 15%." Tenn. Code Ann. § 36-5-101(a)(1)(A) (Supp. 2004); Tenn. Comp. R. & Regs. § 1240-2-4-.02(3).

In the instant case, the trial court specifically found that Mother was not entitled to a modification because "there is not a 15% change." However, while noting this deficiency in the proof, the trial court, surprisingly, went on to order "support calculated using earning capacity of minimum wage rate and total lack of visitation and one child in the home." Thus, it appears that the trial court did, in fact, modify Mother's child support obligation.

The trial court's approach to this issue is incorrect for two reasons. First, if, as the trial court stated, it found that there had not been a significant variance, *i.e.*, no 15% change, there was no basis

[1]Tenn. Code Ann. § 36-5-101 was completely rewritten by the legislature in 2005. The subsection under discussion is now codified at § 36-5-101(f)(1) (2005).

for a modification. On the other hand, assuming, for the purpose of discussion, that the 15% threshold was established, it was incumbent upon the trial court to set a *specific* amount of child support. Tenn. Code Ann. § 36-5-101(a)(2)(A) (Supp. 2004)[2] ("Courts having jurisdiction of the subject matter and of the parties are hereby expressly authorized to provide for the future support . . . of the children . . . by fixing some *definite* amount or amounts to be paid . . . ."). (Emphasis added). This court has explained the importance of this requirement:

> Such a definite obligation provides the dependent children with a predictable amount of support, and enables the obligor to shoulder a known burden. If the obligor's income should increase or decrease substantially, then either party may apply to the court for a modification of the child support obligation. In view of the existence of a well-established mechanism for adjustment of child support, the court's action [in fashioning a formulaic approach], though well-intentioned, amounts to an extension of its authority beyond the mandate of the legislature.

Lovan v. Lovan, No. 01A01-9607-CV-00317, 1997 WL 15223, at *5 (Tenn. Ct. App. M.S., filed January 17, 1997). In the instant case, the trial court did not set a *definite* amount of support. Rather, it enunciated a *formula* for determining Mother's support obligation. This approach was legally incorrect.

Because of the trial court's inconsistent findings and its failure to set a definite amount of child support, we vacate so much of the trial court's order as pertains to modification of child support. However, in the interest of justice, and because we cannot be sure of precisely what the trial court found, we remand this case for a threshold determination of whether, as of the date of the trial court's hearing on February 1, 2005, there had been a significant variance which would entitle Mother to a modification. If the court finds that there had been a significant variance, then we direct the trial court to set a new *specific* amount of monthly child support due, beginning February 2, 2005, the effective date of the trial court's most recent order. If, on the other hand, there was not a significant variance as of the date of the aforesaid hearing, the previous child support award will remain in effect.

IV.

The judgment of the trial court is affirmed in part and vacated in part. This case is remanded to the trial court for such proceedings as are necessary, consistent with this opinion. Exercising our discretion, we tax the costs of this appeal one-half to the appellee, State of Tennessee, DHS, and assignee of Ashley Seeber and one-half to appellant Christal J. Rhea.

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[2] Now codified at Tenn. Code Ann. § 36-5-101(a)(2) (2005).

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CHARLES D. SUSANO, JR., JUDGE